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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

No. 79-923

ALAN L. STEIN, as Secretary of the Business and Transportation Agency of the State of California,

Appellant,

v.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California Corporation, etc., and FEDERAL HOME LOAN BANK BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

I. INTEREST OF AMICI CURIAE

Federally-chartered savings and loan associations are in business throughout the country. They claim to be wholly immune from any state regulation. They are supported and encouraged in this by their federal creator, the Federal Home Loan Bank

Board. Congress has not said that the associations are immune, but the 9th Circuit has done so in this case.

Washington, like California and other states, has anti-discrimination statutes, including one called the Fairness in Lending Act, RCW 30.04.500-.515, which prohibits "redlining". We also are defending a lawsuit to determine whether our Fairness in Lending Act applies to federally-chartered savings and loan associations. *Washington Savings League, et al. v. Chapman*, No. C 78-163S, W.D. Wash. Relying in part on the district court's decision in the instant case, the federal district court in our state has permanently enjoined the application of the Washington law to federally-chartered savings and loan associations. *Washington Savings League, et al. v. Chapman, supra*, Order Granting Permanent Injunction, 24 September 1979. Our motion for a new trial is pending.

A similar case is pending in New Jersey. On 31 October 1979 the United States District Court for the District of New Jersey orally ruled that New Jersey's anti-redlining statute may not be applied to federally chartered savings and loan associations. *Federal Home Loan Bank Board v. Bianchi*, et al., No. 79-1004. The basis for the court's ruling was the 9th Circuit decision in this case.

All states have a vital interest in determining whether they and their citizens are precluded from applying nonconflicting state laws to federally-chartered savings and loan associations. Hence, this

brief amicus curiae, prepared by the attorney general of the state of Washington and joined in by other concerned attorneys general.

II. THE SUPREME COURT SHOULD GRANT A HEARING IN CALIFORNIA'S APPEAL

The Court of Appeals for the 9th Circuit in the instant case said that:

> "The broad regulatory authority over the federal associations conferred upon the Bank Board by HOLA [12 U.S.C. § 1461, *et seq.*] does wholly pre-empt the field of regulatory control over these associations."

The court then held that California could not apply its anti-redlining law to the federally-chartered associations. This was done not because of any conflict between state and federal law, but solely because of a judge-made rule of preemption.

The judge-made rule is that a state may not apply *any* state law to federally-chartered savings and loan associations, whether or not the law conflicts with or inhibits the application of federal law. This judge-made rule of preemption is being applied to state anti-redlining laws despite the fact that Congress has expressly preserved to the states the power to apply their anti-discrimination laws concurrently with federal law. See, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3610(c), 3615; the Equal Credit Opportunity Act, 15 U.S.C. § 1691d (f), and Title VII of the Civil Rights Act of 1964, §§ 706(c), 708, 42 U.S.C. §§ 2000e-5(c), 2000e-7. The policy of *Congress* is to encourage the

states to remain active in the field of anti-discrimination.

A. **False Basis of Total Immunity Theory:**

The theory of the 9th Circuit that federally-chartered savings and loan associations are wholly immune from state law is not based on any language of Congress. It is based wholly on a metaphor in a dictum by a district court judge in 1951. In *People of State of California v. Coast Federal Savings and Loan Association*, 98 F.Supp. 311 at 316 (S.D. Calif. 1951) the Court said:

> The [Federal Home Loan Bank] Board has adopted comprehensive rules and regulations concerning the powers and operations of every Federal savings and loan association *from its cradle to its corporate grave.* (Emphasis added.)

The metaphor has been often repeated, usually as a substitute for legal analysis rather than as an aid to it. The appellant's Jurisdictional Statement cites the cases indicating that the metaphor is not in point because extensive regulation is no longer equated with intent to preempt. We add that the metaphor does not withstand analysis, even on its own terms.

Obviously, numerous areas of the conduct by savings and loan associations are not governed by Federal Home Loan Bank Board (FHLBB) regulations or by the Home Owners Loan Act. For instance, it was necessary for a court to resort to the common law to remedy a breach of fiduciary duty to a federal savings and loan association when its former officers profited from a sale of proxies controlling the association. *Beverly Hills Federal Savings and Loan Association v. Federal Home Loan Bank Board.* 371 F.Supp. 306 (C.D. Calif. 1973). For another example, the Washington Supreme Court has recently affirmed a judgment enjoining a federal savings and loan association from practicing law in this state without a license. *Washington State Bar Association v. Great Western Federal Savings and Loan Association,* 91 Wash.2d 48, 586 P.2d 870 (1978). Regulations of the FHLBB neither permit nor prohibit federal savings and loan associations from practicing law without a license. But if the 9th Circuit's total preemption theory is right, the Washington Supreme Court was wrong.

The total preemption theory is anomalous. Congress has chartered many kinds of corporations and no other kind is immune from state law simply because it is chartered by the federal government. 36 Am.Jur.2d Foreign Corporations § 112 at note 19, § 123 at note 15. National banks are not immune from state law. *Anderson Nat'l Bank v. Luckett,* 321 U.S. 233, 88 L.Ed. 692, 64 S.Ct. 599 (1944).

B. **The Intent of Congress:**

When Congress is acting within its constitutional powers, it may direct that a federal statute operate either concurrently with state law or to the exclusion of state law (preemption). The intent of Congress governs. But the intent of Congress is not to be derived exclusively from what it did in 1933, or what it said in a particular enactment. We should

look at all of what Congress has said on a subject.

Moreover, even an express, strong, and unqualified intent to preempt state law—such as the one found in § 514 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144—must be reconciled with other expressions of the total and current intent of Congress. Thus, in *Bucyrus-Erie Co. v. Department of Ind., Labor and Human Relations of the State of Wisconsin*, 599 F.2d 205, (7th Cir. 1979) the 7th Circuit held that the ERISA preemption clause had to reconciled with the language of Congress in Title VII of the United States Civil Rights of 1964, 42 U.S.C. § 2000e-7 and 42 U.S.C. §2000h-4. After doing so, the Court ruled that a *state* fair employment law applied to Bucyrus-Erie's employee disability benefit plan, notwithstanding that ERISA, with its strong preemption language, also applied.

We are sure that the 7th Circuit would have even less difficulty in reconciling Title VII of the Civil Rights Act with the Home Owners Loan Act (involved in the instant case), which contains no preemption language and which is not as current as ERISA. Yet if the 9th Circuit's "total immunity" reasoning is correct, the states would likewise be barred from enforcing their *fair employment practice* laws on federally-chartered savings and loan associations. The Ninth Circuit has painted itself into this corner by ignoring what Congress has said and relying instead on the cradle-to-the-grave metaphor as a basis for judgment.

The power to regulate federal savings and loan associations is not so exclusively vested in the Federal Home Loan Bank Board that the courts are not able to act. See *Carroll v. Talman Federal Savings and Loan Ass'n of Chicago*, 604 F.2d 1028 (7th Cir. 1979); *Novotny v. Great American Federal Savings and Loan Ass'n*, 584 F.2d 1235 (3rd Cir. 1978) *vacated on other grounds* .....U.S....., 60 L.Ed.2d 957, 99 S.Ct. 2345 (1979), where courts have applied Title VII of the Civil Rights Act of 1964 to federal savings and loan associations. The courts also have applied the federal Equal Credit Opportunity Act to federal savings and loan associations. See *Markham v. Colonial Mortgage Service Co.*, 605 F.2d 566 (D.C. Cir. 1979). Both of those acts of Congress expressly preserve state jurisdiction to regulate concurrently with the federal agencies and courts. This is true also of Title VIII of the Federal Civil Rights Act of 1968 (housing) 42 U.S.C. § 3601-3619, 3631, which the Federal Home Loan Bank Board is implementing in the regulations by which it here claims to have preempted state law. For actions within the scope of these statutes, it is clearly wrong to conclude that because the FHLBB is in the picture the states are not.

C. **Constitutional Issues:**

We thus believe that Congress did not intend for federally-chartered savings and loan associations to be immune from all state law. Even if such an intent were inferable, however, the Court should

pause to consider constitutional issues before giving effect to it. The constitutional issues are of such grave consequence to our federal system of government that this court, we believe, should construe the statutes to avoid raising them even if the inference of preemptive intent were strong. We will here simply identify those issues, because we are asking the Court to *avoid* ruling on them by construing the statutes as not immunizing federally-chartered savings and loan associations from all state law.

(1). **Constitutionality of Chartering:**

We have found no reported decision adjudicating whether Congress acted within its delegated powers when it provided for federal chartering of savings and loan associations in their present form. The United States Supreme Court has never passed on the issue. One circuit court of appeals addressed constitutional issues in a case which involved a prior form of federal savings and loan association of which the United States government held majority ownership. *First Federal Savings and Loan Association of Wisconsin v. Loomis*, 97 F.2d 831 (7th Cir. 1938). There the Court, in a split decision, rejected the claim that Congress' reliance on its fiscal powers as a basis for chartering savings and loan associations was a pretext. The majority in that case also said that Congress might charter such associations in exercise of its power to spend for the general welfare—that is, as a means of funneling money from the United States treasury to a credit-starved public in

the depths of the great depression.

Notably, however, the United States government no longer has any ownership interest in federal savings and loan associations, nor does it use them to funnel dollars from the U.S. Treasury to the public. Federal savings and loan associations at this time are nothing but private businesses, and this is all that they are intended to be under current law.

This Court has held that Congress may charter corporations for the purpose of carrying out a program that is within the power of Congress to institute. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). The justifying function of the Bank of the United States, creation of which was approved in *McCulloch v. Maryland*, was to manage the monetary policy of the United States, the present function of the Federal Reserve System. But this Court has never held that Congress has the power to charter corporations simply to do business. Perhaps there is a public benefit from the availability of federal as well as state-chartered savings and loan associations (although the need for them at this time is not evident). But the same thing could be said of federally-chartered corporations to manufacture automobiles, to build houses (why stop at financing them?), or to practice law.

If Congress has the power simply to charter corporations for the general welfare, that power has no logical limits—and its exercise will be economically irresistible if the federally-chartered corporations are all immune from state law.

(2). **Constitutionality of Immunity:**

If Congress has power to not only charter business corporations but to immunize them from *all* state law, the shift of power from the states to the central government will be revolutionary. Congress could immunize any business from state law simply by granting it a federal charter (under circumstances implying that Congress intends to "occupy the field.") But if Congress can do this through the means of chartering corporations, why can it not prevent state regulation of a "field" of business by direct legislation? After all, this Court in *McCulloch v. Maryland* approved of the creation of corporations as a *means* Congress may use to achieve a permissible end. If the permissible end is to free businesses of the bother of complying with general state laws, then that end can be achieved directly by a simple act of Congress; *e.g.*, as follows:

> "The Congress hereby finds that the general welfare will be served by (that the regulation of interstate and foreign commerce requires) freeing business from state law. It is therefore enacted that the field of regulation of business is preempted, and hereafter no business (no person?) need comply with any law of any state wherein it is located or where it does business."

It is no answer to say that Congress respects our nation's traditions and would never do this. That would be like saying that no means of removing a president from office are necessary, because no one elected by the people for that high office would abuse his power. When laying down constitutional prin-

ciples, one must assume that an entity that has a power will use it.

III. CONCLUSION

The State of Washington and the other states joining in this brief ask that the preemption issue be decided by this Court in an opinion after argument. We are confident that this Court, undazzled by the cradle-to-the-grave metaphor, will decide the issue through the analysis of precedents and the application of sound public policy. If that is done, the Court should conclude, as it has for every other kind of federal corporation, including national banks, that the associations are not immune from all state law.

If the Ninth Circuit decision is left standing, there will be uncertainty and litigation throughout the country as to whether any state law can be applied to a federal savings and loan association. The uncertainty and litigation will continue until this Court speaks. We ask the court to settle the issue now.

Respectfully submitted,

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